No. 93-684

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1993

ATLANTIC HEALTHCARE BENEFITS TRUST,
et al.,

Petitioners

v.

CYNTHIA M. MALESKI, et al.,

Respondents

On Petition for Certiorari to
the United States Court of
Appeals for the Third Circuit

RESPONDENT MALESKI'S BRIEF IN OPPOSITION

ERNEST D. PREATE, JR.
Attorney General

BY: JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Pennsylvania's insurance licensure laws, as applied to the petitioners, are inconsistent with the relevant provisions of the Employee Retirement Income Security Act of 1974?

2. Whether Pennsylvania's insurance licensure laws, as applied to the petitioners, violate the due process or equal protection clauses?

LIST OF PARTIES

The parties listed in the petition for certiorari are accurate, except that respondent Constance B. Foster, the Insurance Commissioner of Pennsylvania, has been succeeded in that office by Cynthia M. Maleski, who should be substituted for her. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	8
I. THIS CASE PRESENTS A STRAIGHTFORWARD ISSUE OF STATUTORY CONSTRUCTION ON WHICH THE COURTS OF APPEALS ARE IN ACCORD WITH EACH OTHER AND WITH THIS COURT....	8
II. PETITIONERS' CONSTITUTIONAL CLAIMS, WHATEVER THEY ARE, DO NOT WARRANT REVIEW BY THE COURT.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES	PAGE(s)
Atlantic Healthcare Benefits Trust Trust v. Googins, 2 F.3d 1 (2d Cir. 1993)	7,12
FMC Corp. v. Holliday, 498 U.S. 52 (1990)	13,14
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985)	9
Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 409 (1982)	16
STATUTES AND RULES	
Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq.	1
29 U.S.C. § 1002(40)(A)	11
29 U.S.C. § 1002(40)(a)	2
29 U.S.C. § 1003(a)	15
29 U.S.C. § 1003(b)(1),(2)	15
29 U.S.C. § 1144	9
29 U.S.C. § 1144(b)(6)	11
29 U.S.C. § 1144(b)(6)(A)(i)	11
29 U.S.C. § 1144(b)(6)(A)(ii)	11
Erleborn-Burton Act, 96 Stat. 2611	10
Sup. Ct. R. 14.5	16
Sup. Ct. R. 35.3	ii

MISCELLANEOUS

Sen. Comm. on Governmental Affairs, Interim Report on Combating Fraud and Abuse in Employer Sponsored Health Benefits Plans, S. Rep. No. 102-262, 102nd Cong., 2nd Sess. 3-4 (1992)..... 10

Department of Labor Opinion No. 90-18A [available at 1990 LEXIS ERISA 26]..... 13

STATEMENT OF THE CASE

This case arises out of the respondent Pennsylvania Insurance Commissioner's enforcement action to shut down the petitioners' unlicensed insurance business. Petitioners responded by claiming that the Pennsylvania laws under which the respondent acted are inconsistent with the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq. (ERISA), and are otherwise unconstitutional.

1. United Healthcare Association of America, Inc., one of the petitioners, is a Virginia corporation formed "to enable employers to associate with one another to provide health and welfare benefits to their employees and dependents. " C.A.

App. 120.[1] In March of 1991, the Association established the Atlantic Healthcare Benefits Plan for this purpose. C.A. App. 118, 120. The Plan holds itself out to be a "multiple employer welfare arrangement" or "MEWA" within the meaning of ERISA, C.A. App. 120, see 29 U.S.C. § 1002(40)(a), and it is self-funded, that is, it is not insured. C.A. App. 120. The Association appointed National Insurance Consultants, Inc., another petitioner, as the Plan Administrator to market and administer the Plan on a day-to-day basis, C.A. App. 9, 122; and established the Atlantic Healthcare Benefits Trust--the third petitioner--to hold and invest the Plan's assets. C.A. App. 9, 20.

---

[1]The designation "C.A. App." refers to the Appendix filed in this case in the Court of Appeals.

In June of 1991, the Pennsylvania Insurance Department commenced administrative proceedings against the Association and its president, the Plan Administrator and its owner, and the Trust. Pet. App. 23a. The facts of the case were not disputed, Pet. App. 27a, and after briefing from both sides the Insurance Commissioner issued a decision in November of 1991. She found that the petitioners were marketing and selling a health and medical benefits plan which constituted insurance, Pet. App. 34a-35a; that they were neither licensed as insurers themselves nor were they providing coverage through a licensed insurer, Pet. App. 24a, 26a; and in short, that they were engaged in the business of insurance without a license. Pet. App. 36a.

The Commissioner held that the petitioners had violated a number of Pennsylvania laws and rejected petitioners' arguments that ERISA pre-emption relieved them from the need to comply with these statutes. Pet. App. 27a-34a. Nothing that Delaware, Kentucky and Maryland had issued similar orders, the Commissioner ordered the appellants to cease and desist soliciting subscribers, renewing policies or accepting premiums; to return all the premiums they had received; and to pay a civil penalty. Pet. App. 26a-27a, 38a-39a.

2. Petitioners did not appeal this decision through the state court system, but instead brought this action in federal court. They claimed that their activities are exempt from state regulation under the pre-emptive provisions of ERISA and that the respondent's enforcement action

violated unspecified constitutional rights. They sought declaratory and injunctive relief.

The respondent moved to dismiss, and the District Court granted her motion, on the ground petitioners had failed to state a claim on which relief could be granted. Pet. App. 3a-21a.[2]

The District Court assumed for the sake of argument that petitioners' Atlantic Healthcare Benefits Plan was an "employee welfare benefit plan" within the meaning of ERISA, and hence covered by ERISA pre-emption. Pet. App. 9a-19a. She held, however, that the Plan was also a non-insured "multiple employer welfare arrangement" or "MEWA"; that in such

---

[2]The District Court also dismissed, on the ground of Eleventh Amendment immunity, petitioners' claims against the Pennsylvania Insurance Department, Pet. App. 6a. Petitioners did not challenge this ruling in the Court of Appeals.

cases, ERISA pre-empts only those state laws which are inconsistent with ERISA; and that the Pennsylvania licensing laws to which petitioners had been subjected were not inconsistent with ERISA. Pet. App. 19a-20a. She likewise rejected the petitioners' constitutional claims. Pet. App. 20a-21a.

3. In the Court of Appeals, the petitioners again argued that Pennsylvania's laws governing the licensure of insurance companies are pre-empted by ERISA; and that, in any case, Pennsylvania's licensing laws are void for vagueness because they do not specifically mention MEWA's by name.[3] Petitioner's arguments were virtual carbon copies of

---

[3]Petitioners made a number of other arguments as well, including the argument that ERISA itself is unconstitutional, but as these are not repeated in their petition, there is no need to address them.

the arguments they had made to the Second Circuit in Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1 (2d Cir. 1993), petition for cert. filed, No. 93-685 (Nov. 1, 1993); and the Third Circuit decided the case without opinion, via a judgment order that cited the Second Circuit's opinion in Googins and the District Court's opinion in this case. Pet. App. 2a. This petition followed.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS A STRAIGHTFORWARD ISSUE OF STATUTORY CONSTRUCTION ON WHICH THE COURTS OF APPEALS ARE IN ACCORD WITH EACH OTHER AND WITH THIS COURT.

The primary issue petitioners present is whether ERISA pre-empts state insurance licensure laws, as applied to ERISA welfare benefit plans such as theirs. Pet. 9-10. Petitioners claim that this issue is fraught with "interpretive ambiguities," which have spawned conflicting decisions among the Courts of Appeals, and that the decision in this case conflicts with decisions of this Court as well. Pet 9. The truth, however, is just the opposite: this statutory construction issue is easily resolved by resorting to the plain language of the statute; both Courts of Appeals to have considered this issue have reached the

same result; and that result conflicts with no decision of this Court. We turn first to the statutory language.

1. ERISA's pre-emption provisions are contained in 29 U.S.C. § 1144, reprinted at Pet. 2-3. At its broadest, ERISA pre-emption "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with [ERISA]." Metropolitan Life Insurance. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

In 1983, however, Congress amended ERISA to enhance the authority of the States to deal with the growing problem posed by so-called "multi-employer trusts"--commercial enterprises which had sprung up in ERISA's wake and were operating effectively free of either state of federal regulation. Many of these enterprises were under-funded, mismanaged

or outright fraudulent, and left thousands of beneficiaries stranded with unpaid bills. See Sen. Comm. on Governmental Affairs, Interim Report on Combating Fraud and Abuse in Employer Sponsored Health Benefits Plans, S. Rep. No. 102-262, 102nd Cong., 2nd Sess. 3-4 (1992). In response, Congress enacted the Erlenborn-Burton Act, 96 Stat. 2611, to "remove[] any potential obstacle... which could hinder the ability of the States to regulate multiple employer welfare arrangements to assure the financial soundness and timely payment of benefits under such arrangements." 128 Cong. Rec. 30357 (1982)(remarks of Rep. Erlenborn).

The Erlenborn-Burton Act added to ERISA the concept of the "multiple employer welfare arrangement" or "MEWA," defined simply as "any ... arrangement" established to offer benefits to the

employees of two or more employers. 29 U.S.C. § 1002(40)(A).

To enable the States better to protect the beneficiaries of MEWA's, the Act also amended ERISA's pre-emption provisions by adding a new sub-paragraph (6) to Section 1144(b). 29 U.S.C. § 1144 (b)(6). Under sub-paragraph (6), employee welfare benefit plans which are also MEWA's, and which are fully insured, are subject to state insurance laws, to the extent that those laws require the maintenance of minimum reserve and contribution levels. Id., § 1144(b)(6)(A) (i). In the case of employee welfare benefit plans which are MEWA's, and which are not fully insured, "any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title." 29 U.S.C.§ 1144(b)(6)(A)(ii)(emphasis added).

In this case, the District Court assumed that petitioners' Plan qualified as an employe welfare benefits plan, Pet. App. 19a, and the petitioners admit that their Plan is a MEWA and that it is uninsured. Pet. 6. The conclusion is thus inescapable, and petitioners seem to concede, Pet. 5, that they and their Plan are subject to "any law of [Pennsylvania] which regulates insurance" as long as those laws are not actually inconsistent with Title I of ERISA.

2. State insurance licensure laws, as such, are not inconsistent with Title I of ERISA; and there are no conflicts, among the Courts of Appeals or otherwise, on this issue. Only two Courts of Appeals have decided this issue: the Second Circuit in Atlantic Healthcare Benefits Trust v. Googins, 2 F.3d 1, and the Third Circuit in this case, and both reached the

same result. The Department of Labor, charged with enforcing ERISA, likewise agrees. Department of Labor Opinion No. 90-18A [available at 1990 LEXIS ERISA 26].

What petitioners mischaracterize as "conflicts among the states" on this issue, Pet. 9, are not conflicts at all, but simply different regulatory approaches which are the natural result of Congress' decision to authorize state regulation in this area. There is thus no occasion for the Court to review this case to settle any "conflicts" among the lower courts.

Nor does the Court of Appeals' decision conflict, as the petitioners suggest, Pet. 9-10, with FMC Corp. v. Holliday, 498 U.S. 52 (1990). The pre-emption provisions which govern this case apply only to MEWA's, that is, to multiple employer plans. Holliday, in contrast, involved a welfare plan established by a

single employer and was governed by quite different provisions. 498 U.S. at 54, 57-58. In deciding Holliday, the Court naturally had no reason to construe, to consider, or even to mention the MEWA-specific provisions of Section 1144(b)(6), and in fact the Court did not do so. Holliday, far from being controlling here, is thus not even apposite.

3. Finally, petitioners argue that even if state insurance laws are not, in general, inconsistent with Title I of ERISA, Pennsylvania's laws in particular are. Pet. 12. Issues that turn on peculiarities in the laws of individual States, however, are not the sort of issues that justify the exercise of the Court's discretionary jurisdiction, and are better left to the Courts of Appeals.

In any event, the petitioners are wrong that it is a "physical

impossibility," Pet. 14, to comply simultaneously with both ERISA and Pennsylvania's licensing laws.

Petitioners rely mainly on the idea that ERISA--specifically, 29 U.S.C. § 1003(a)--requires that plan assets be held in a trust, and that a trust, as opposed to a corporation, cannot obtain an insurance license in Pennsylvania. Pet. 12. However, as petitioners' Plan was both sponsored and administered by corporations, supra at 1-2, this hardly seems a serious argument. In addition, ERISA provides that plan assets which are held by an insurance company or which consist of insurance polices need not be placed in a trust. 29 U.S.C. § 1003(b)(1), (2). There was thus no structural barrier to petitioners complying with both ERISA and Pennsylvania insurance law.

II. PETITIONERS' CONSTITUTIONAL CLAIMS, WHATEVER THEY ARE, DO NOT WARRANT REVIEW BY THE COURT.

Petitioners' constitutional claims Pet. 15-16, are almost unintelligible, and this alone is sufficient reason to deny their petition. Sup. Ct. R. 14.5. If they are attempting to reprise the void-for-vagueness argument they made in the Court of Appeals--that Pennsylvania's laws are void for vagueness because they do not mention MEWA's by name--then that argument presents no novel or important issues, and was correctly resolved by the Court of Appeals by the routine application of well-established principles. See, e.g., Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 409, 498-99 (1982). If they are attempting to argue anything else, then they are foreclosed by their failure to argue it below.

CONCLUSION

For these reasons, the respondent asks the Court to deny the writ of certiorari.

Respectfully submitted,

ERNEST D. PREATE, JR.
Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Fl., Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: December 3, 1993